**IN THE HIGH COURT OF JUDICATURE AT BILASPUR**
**CHHATTISGARH**

**W. P. No.** 896 **/2006** Single Bench

**PETITIONER** : Suklal S/o- Late Shri Ramchand Aged about 56 years, R/o- Village Rajabhanpuri, Tahsil & District Rajnandgaon (C.G.)

**VERSUS**

**RESPONDENTS** :1) Prem Kumar Bandhe S/o- Shiv Lal Aged about 30 years, R/o- village Rajabhanpuri, Tahsil & Distt- Rajnandgaon (C.G.)

2) Returning Officer ( Panchayat Block Rajnandgaon) Distt- Rajnandgaon (C.G.)

3) Nohru Ram Sahu, Presiding Officer, Village Panchayat Rajabhanpuri, Booth no. 201, Occupation Assistant Vetnary Medical Officer Village Kohka, R/o- Tumdiboard Tahsil & Distt- Rajnandgaon (C.G.)

4) Shri M. L. Sirdar, Sub Divisional Officer, Rajnandgaon (C.G.), Acting as Presiding Officer, Election Tribunal, Collectorate ,Rajnandgaon (C.G.)

OATH COMMISSIONER APARNA MALVIYA CG-2073/26 Bilaspur Chhattisgarh

**WRIT PETITION UNDER ARTICLE 226/ 227 OF THE CONSTITUTION OF INDIA.**

APR

(46)

# HIGH COURT OF CHHATTISGARH, BILASPUR

## W.P.No.896 OF 2006

Suk Lal
Vs.
Prem Kumar Bandhe andothers

**JUDGMENT**

Sd/-
Sunil Kumar Sinha
Judge

AFR

# HIGH COURT OF CHHATTISGARH, BILASPUR

## W.P.No.896 OF 2006

Suk Lal
Vs.
Prem Kumar Bandhe andothers

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Shri Anoop Majumdar, counsel for the petitioner.

Shri Anand Kumar Tiwari, counsel for respondent no.1 on caveat.

Shri Arun Sao, Dy.Govt. Advocate for respondent no.2, returning officer.

None for respondents no.3 & 4.

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## JUDGMENT

(12.03.2006)

**Sunil Kumar Sinha, J**

> "The justice delayed may amount to justice denied, but justice hurried may in some cases amount to justice buried."

The secrecy of ballot is always insisted in a democratic system of Socicty to respect a fair election but the inspection may be directed when it necessitates to secure the ends of justice keeping in mind the necessity of maintaining the secrecy of ballot papers as the preservation of the Secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is genuine need for it. The process adopted in finding a necessity, must be known to law and the requirement of procedural law may not be by-passed to reach in hurry to the conclusion to open the seal of ballot boxes. The finality of decision vide Rule 25 of The Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 creates a great

(48)

responsibility on the Specified Officer to strictly act in accordance with the Rules, which has not been done in this case by passing an order of recount at the very preliminary stage which constrains this Court to write a judgment as follows:

(2) The brief facts are that an election for the post of Sarpanch, Gram Panchayat Bhanpuri, Distt. Rajnandgaon (C.G) took place on 20.10.2005. The petitioner was declared elected by a margin of one vote against respondent no.1. The respondent no.1 challenged the election of the petitioner on the ground that some valid votes polled by the respondent no.1 were illegally declared as invalid by the Returning Officer and the counting was not proper. He made allegations that though an application for recount was given under the relevant rules before the Returning Officer at the time of counting but the Returning Officer did not accept the said application and ultimately the results were declared in the aforesaid manner. The only prayer made in the election petition is that a recounting be directed and the election of the petitioner be set aside. The petitioner filed his written statement and denied the contentions of respondent no.1. His contention was that the counting was properly done and further, no objection was raised by respondent no.1 at the time of counting for recount and the allegations regarding submission of an application at the time of counting for a recount are false. No case of recount is made out. He prayed for dismissal of the petition. It appears that the Specified Officer, thereafter heard the arguments and recorded a finding that since an application for recount was given by the respondent before the Returning Officer and the Returning Officer did not accept the aforesaid application

and further since there is a defeat by margin of one vote only, it would be proper to direct the recount and in this manner, he allowed the election petition and directed for recounting of votes by the impugned order dated 10.2.2006 passed in Election Petition No.3-B/121/2004-2005.

(3) Learned counsel for the petitioner submitted that finding in relation to submission of an application for recount before the Returning Officer is based on no evidence on record. His further submission was that unless it is established that an application for recounting was given before the Returning Officer, a petition for recounting of votes would not be maintainable. He also submitted that a petition for recount cannot be allowed without affording an opportunity of leading evidence to the parties and without recording a positive finding as to why a recount is necessary. The submission was that unless a foundation regarding prayer of recount is laid down by the election petitioner and the same is substantiated by the cogent oral and/or documentary evidence, an order of recount,only on the basis of pleadings of the parties, was not justified.

(4) Per contra, learned counsel for the respondent no.1 submitted that the order of recounting can be passed on the basis of pleadings of the parties and the impugned order cannot be set aside on this ground alone. His further submission was that filing of an application for recounting before the Returning Officer was not a condition precedent for the purposes of a petition for recounting u/s 122 of the Panchayat Raj Adhiniyam and this point should not be given much weightage if a case of recount is otherwise made out by the election petitioner.

(5) I have heard learned counsel for the parties at length and have also perused the records of the writ petition.

(6) The first point about the maintainability of the election petition u/s 122 of the Panchayat Raj Adhiniyam 1993 (hereinafter referred to as the Act) in absence of a request for recount at the time of counting before the Returning Officer under Rule 80 of the M.P. Panchayat Nirwachan Rules (hereinafter referred as the Rules) is no longer resintegra. Earlier, the Apex Court held in the matter of ***Smt. Ram Rati -Vs- Saroj Deol, AIR 1997 S.C. 3072*** that unless a party first applies to the Returning Officer for recounting of votes, it is not open to the Tribunal or the Court to direct recounting. It was held that an application for recounting in writing to the Returning Officer was an essential pre-condition for filing election petition on such grounds. Later on, in the matter of ***Sohanlal -Vs- Babu Gandhi and others, AIR 2003 S.C. 320***, the Apex Court while dealing almost the same points considered the earlier decision of *Smt. Ram Rati's case* (supra) and held that the ratio laid down in the said case is not correct. Considering the provisions of section 43, 195 & 122 of the Act and Rule 80 of the aforesaid Rules, the Apex Court held in this matter that under Sub-Rule(5) of Rule 80, once the result sheet is completed and signed no application for recount can be entertained. It was also held that rule 81 also provides that after recounting of the votes, the Returning Officer shall prepare a return and declare the candidate who has the largest number of votes to have been elected. Under rule 83, a certificate is to be granted to the returned candidate who has been declared elected. Under rule 84, after the certificate has been granted, the Election Officer or the

(51)

Returning Officer can only correct the clerical or arithmetical mistakes. Therefore, after declaration of results, the Returning Officer has no power either to recount or to change the results of the election. Once the result is declared, the only remedy of an aggrieved party is an election petition under section 122 of the Act. Therefore, it was held that it is not correct to hold that in an election petition, after declaration of the result, the Court or Tribunal cannot direct recounting of votes unless the party has applied for recounting of votes before the Returning Officer. There is no prohibition in the Act or under the Rules prohibiting the Court or Tribunal to direct the recounting of votes. Even otherwise a party may not know that the recounting is necessary till after result is declared. At this stage, it would not be possible for him to apply for recounting to the Returning Officer. His only remedy would be to file an election petition u/s 122 and in such cases, the Court or Tribunal is bound to consider the ples and where the case is made out, it may direct recount depending upon the evidence led by the parties.

In this view of the matter, it is apparent that there is no requirement of law that for filing an election petition for recount an application for recount must have been made before the returning officer at the time of counting of votes under Rule 80 of the aforesaid Rules and an election petition would always be maintainable u/s 122 of the Act, even if an application for recount is not given to the Returning Officer, as referred to above.

(7) Now the main question arises as to whether the tribunal was justified in passing an order for recount in the prevailing facts and circumstances of this case ?

(8) The Apex Court in the matter of ***Ram Sewak Yadav -Vs- Hussain Kamil Kidwai and others, AIR 1964 S.C. 1249*** held that an order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case ; and

(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

The Apex Court also added a rule of caution while enunciating the above law that an order for inspection for ballot papers cannot be granted to support vague pleas made in the petition not supported by the material facts or fish out evidence to support such pleas. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

(9) In the matter of ***D.P. Sharma V-s- Commissioner and Returning Officer, 1984 (Supp) SCC 157***, the Apex Court laid down that "It is well established that in order to obtain recount of votes a proper foundation is required to be laid by the election petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or

improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidate which had in reality been cast in favour of the defeated candidate."

(10) In the matter of ***P.K.K. Shamsudeen -Vs- K.A.M. Mappillai Mohindeen and others, (1989) 1 SCC 526***, the Apex Court further held that "the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derivered from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interest of justice, a Tribunal or Court should not order the recount of votes."

(11) In the matter of ***P.H.Pular Vs. Kanthi Rajashekhar Kidiyappa and others (2002) 3 SCC 742***, it was held by the Apex Court that the recount of votes cannot be ordered in a casual manner. It cannot be ordered because the margin of defeat is meagre.

(54)

For seeking recount, proper foundation is to be laid in the pleadings by setting out material facts and later proving it by adducing requisite evidence. The recount cannot be ordered on the *ipse dixit* of the election petitioner. It can be ordered in rare cases where specific allegations are made and proved so as to do complete justice between the parties *(See para 14)*. It was also held that the petitioner seeking recount should allege and prove that there was improper acceptance of votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the said allegations can it order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality and irregularity in counting. *(See para 13)*.

**(12)** In the light of the above enunciations of the Apex Court, if we examine the present case, it would appear that the election petition was filed by respondent no.1 only for recount of votes and the allegations are that certain valid votes polled by respondent no.1 were illegally declared as invalid by the Returning Officer and the counting was not proper. The allegations are made against the Returning Officer that he, with an intention to extend illegal benefit to the petitioner, acted malafidely against the respondent no.1 and after improper counting of votes he declared the petitioner elected by margin of one vote. The further allegations are that when an application for recount was given, the Returning Officer firstly denied to accept the same and thereafter at the request of respondent no.1, he received application, but the recount was not done. These facts have been clearly denied by the petitioner by filing a written

55

statement to the Election Petition filed by respondent no.1. The Specified Officer did not record the evidence of the parties to get the pleadings substantiated in accordance with law and after hearing the arguments, he allowed the election petition recording a finding that an application for recount was given and since the recount was not done, respondent no.1 was entitled to claim for recounting of votes and the same should be done. The finding about submission of an application, is not based on any evidence on record as admittedly, the Specified Officer has not given opportunity to adduce evidence to the parties. This finding is based upon the pleadings of the parties only and for this reason, the same cannot be sustained in the eye of law. The law in relation to the point is well settled. It is a requirement of law that firstly there must be a pleading laying down foundation by the election petitioner indicating the precise material on the basis of which it could be said that there has been improper reception of invalid votes in favour of an elected candidate or there was improper rejection of valid votes in favour of the election petitioner. After such a foundation is laid down, an opportunity by way of notice must be given to the returned candidate and after entertaining a written statement on the points raised by the election petitioner, the Tribunal must give an opportunity to adduce evidence to both the parties to substantiate their claims and then only any finding in relation to a particular fact in issue should be recorded by the Tribunal.

**(13)** The M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules 1995 (hereinafter referred to as the Rules) lay down a complete procedure for disposal of an election petition. Rule 11 specifically lays down the

56

procedure before the Specified Officer and his powers. Sub-Rule (1) of this Rule provides that subject to the provisions of these rules, every election petition shall be enquired into by the Specified Officer as nearly, as may be, in accordance with the procedure applicable under the Code of Civil Procedure 1908, to the trial of suits: provided that it shall only be necessary for the Specified Officer to make a memorandum of the substance of the evidence of any witness examined by him. It further lays down that the Specified Officer shall have the powers which are vested in a court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters:-

(a) *discovery and inspection;*

(b) *enforcing the attendance of witnesses, and requiring the deposit of their expenses;*

(c) *compelling the production of document;*

(d) *examination of witnesses on oath;*

(e) *reception of evidence taken on affidavit; and*

(f) *issuing commission for examination of witnesses and summoning and examining suo moto any person whose evidence, appears to him to be material.*

Rule 12 lays down an obligation upon the parties to produce their witnesses on the date fixed for evidence and it further provides that they shall not be entitled to an adjournment for non-attendance of their witnesses with a proviso giving discretion to the Specified Officer to order the issuance of summons to any witness on the necessary process fee and cost being deposited by the party concerned.

(14) This all makes it manifest that if such an exercise is not done; any order passed allowing the election petition including the recount of votes cannot be sustained. The election petitioner cannot be allowed to pray for a roving enquiry in order to fish out materials to set aside the election and he cannot be permitted to take a chance by filing election petition. The underlying principles laid down in the above referred enunciations of the Apex Court go to show that the secrecy of the ballot is insisted upon and the same should not be ordinarily disturbed as a matter of course having regard to the insistence upon the aforesaid secrecy.

(15) In the facts and circumstances of this case, I do not find the impugned order to be defensible in this petition. The same has been passed on the basis of no material on record as if the Tribunal is conducting a roving enquiry on the grievance made by the election petitioner which is not the principle underlying the provisions of the Rules or the enunciations of the Apex Court in this regard.

(16) In the result, the petition is allowed. The impugned order is quashed. The matter is remanded to the Specified Officer and he is directed to dispose of the election petition on merits in accordance with law keeping in mind the principles referred herein above and the observations made by this Court in this order.

There shall be no order as to the costs.

**Sd/-**
**Sunil Kumar Sinha**
**Judge**

*Rao*